WP(C) 2745/2006
BEFORE
HON'BLE MR. JUSTICE B.K. SHARMA

All the writ petitions, being interrelated have been heard analogously a nd are being disposed of by this common judgment and order.

2. In the first two writ petitions, filed by one and the same writ petition er is a company incorporated under the Companies Act, 1956. While in the first w rit petition, the grievance raised is in respect of implementation of the terms and conditions of the Memorandum of Understanding (MOU) and the lease deed ente red into by and between the petitioner and the respondent No. 2 company owned by the Government of Assam, in the second writ petition the grievance raised is in respect of refusal on the part of the respondent No. 4 bank to provide working capital. The third writ petition has been filed by employees association of the respondent No. 2 company for a direction to the respondents to provide the emplo yees with the service benefits and to take steps for revival and functioning of the company.

3. The writ petitions are based on the following facts.

WP(C) No. 8097/2002

M/s. Ashok Paper Mill Limited was initially promoted as a private company in the year 1958 with two paper mills - one located at Jogighopa, Assam and another at Rameswar Nagar, Bihar. The company went into liquidation in the year 1963 and i n the year 1970, the Government of Bihar and the Government of Assam took over t he company as a joint venture with active participation of Industrial Developmen t Bank of India (IDBI). Although, the paper mill at Jogighopa, Assam commenced p roduction in the year 1975, but it gradually became sick and finally stopped pro duction sometime in 1983.

4. A memorandum of settlement dated 15.8.1985 was signed between the Govern ment of India and the Students Body of Assam namely All Assam Students' Union (AASU) commonly known as the Assam accord , containing interalia, the clause for revival of the paper mill at Jogighopa. On the basis of such settlement, the pa ckage for revival of the mill was finalized and the Government of India agreed t o release, by way of an outright grant, a sum of Rs. 67.08 crores to the Governm ent of Assam under different heads.

5. The Government of Assam enacted the Jogighopa (Assam) Unit of Ashok Pape r Limited, Calcutta (Acquisition and Transfer of Undertaking) Act, 1990. By virt ue of Section 3 of the Act, the paper mill at Jogighopa stood transfer and veste d in the Government of Assam. In March, 1995, a MOU was signed between Ashok Pap er Mill (Assam) Limited (APM) and one M/s. Sanghi Textile Processors (P) Ltd. of Hyderabad for the purpose of leasing out the paper mill. Lease agreements etc. were also executed which eventually stood terminated on 1.7.1999.

6. After the aforesaid developments and abandonment of the mill by Ms/ Sang hi Textile processors (P) Limited, advertisement were published in the newspaper in July, 1999 inviting offers from private sector participants for re-activatio n of the paper mill, to which the petitioner company responded. After series of discussions with the Government of Assam officials as well the Managing Director of APM, the MOU and the lease deed dated 26.7.2000 and 10.1.2001 respectively w ere executed by and between the parties. Initial lease period was for 25 years w ith effect from the actual date of taking over physical possession of the mill, which was 2.8.2000.

7. The petitioner has indicated certain terms and conditions of MOU and the lease agreement in the writ petition including the major works required to be u

ndertaking for revival of the mill and the execution thereof carried out. Referring to Annexure-3 technical report submitted by the Central Pulp & Paper Research Institute, Sahrainpur, U.P., prepared on the basis of the visits to the paper mill on 22nd, 23rd and 24th March, 2001, it is the case of the petitioner that it had executed the required works and the paper mill was ready for trial production. According to the petitioner it had spent an amount of Rs. 6,38,47,330/- upto march, 2001 and had submitted its claim to the respondents from time to time in phased manner. However, it had only been sanctioned an amount of Rs. 2,97,00,000/-. According to the petitioner the aforesaid amount of Rs. 6,38,47,330/- was on account of capital expenditure towards creation of assets for rejuvenation and rehabilitation of the paper mill.

8. Referring to the various clauses of the MOU and the lease deed, it is the case of the petitioner that although the amounts spent and/or claimed by it on account of capital expenditure is to be reimbursed in installment of Rs. 1 crore within 7 days from the date of submission of the claim, the respondents met with the 1st, 2nd and the 3rd claim after much delay and not at all responded to the subsequent claim. It has been stated by the petitioner that the total claim on account of capital expenditure made by it was for Rs. 8,07,23,313.50 against which the petitioner had only receipt the amount of Rs. 2,97,00,000/- and thus, an amount of Rs. 5,10,23,313.50 was still receivable by the petitioner. It is the further case of the petitioner that apart from the said amount, it is also entitled to the grant of eligibility certificate under the Industrial Policy of Assam, 1997.

9. Referring Annexure-4 letter dated 1.8.2000 addressed to the Government of India in the Ministry of Industry by the Government of Assam in the Industries & Commerce Department, the petitioner asserts that the Government of Assam was fully alive to the legitimate claim of the petitioner. By the said letter the request made was for approval of utilization and release of Rs. 7.97 crore (Rs. 2.97 crores in hand and Rs. 5 crores to be sanctioned by the GOI) in favour of the petitioner as per clause 9.3 of the MOU. The petitioner has stated that neither the said amount of Rs. 5 crores nor the excise duty exemption having been granted in favour of it, it was not in a position to commenced production in terms of the MOU and the lease deed. According to the petitioner the delay in commercial production is directly attributable to the respondent. However, referring to Annexure-5 letter dated 19.2.2001 addressed to it by the Managing Director of APM, it is the case of the petitioner that the mill was ready for trial run since February, 2001.

10. In view of the above, the petitioner by its various letters intimated the respondent that due to non-payment of the legitimate dues, non-grant of excise duty and sales tax exemption and non-issuance of factory and explosive licences, it was not in a position to drawn up schedule for trial production and eventual commencing of the commercial production in the mill. In this connection the petitioner has also referred to the minutes of discussion dated 7.8.2002 held in presence of the Minister of Industries, Commissioner & Secretary and Deputy Secretary, Industries Department and the Managing Director of APM alongwith the representatives of the petitioner company.

11. According to the petitioner, inspite of the aforesaid position relating to the affairs of the production in the mill and discharge of the obligations on the part of the petitioner, the respondents in a most illegal and arbitrary manner issued the Annexure-10, 11, 12 and 13 letters dated 21.10.2002, 9.10.2002, 1.11.2002 and 6.11.2002 respectively threatening termination of lease upon failure of the petitioner to start production in the mill by 31.12.2002. In fact, by Annexure-12 letter dated 1.11.2002, an explanation was sought for within 7 days in reference to the earlier notice, upon failure of the petitioner in not starting the required activities in the mill premises with a view to start production by 31.12.2002. Further by Annexure-13 letter dated 6.11.2002, a direction was iss

ued for obtaining undertaking from the petitioner within 15.11.2002 failing whic h termination notice was to be issued. It will be pertinent to mention here that in fact such undertaking was conveyed by the petitioner as reflected in the ord er dated 18.11.2002 passed by the Division Bench of this Court in WP(C) (PIL) No . 44/2000 about which discussion will be made at a later stage. Be it further st ated here that in terms of clause 5 of aforesaid minutes of discussion dated 7.8 .2002, release of Rs. 5 crore against cash loss was to be taken up with the Gove rnment of India only after the mill had gone into commercial production for a mi nimum period of three months.

12. According to the petitioner the decision of the respondents has conveyed by the aforesaid Anexure-10, 11, 12 and 13 letters was contrary to the aforesai d minutes of discussion dated 7.8.2002. It is the stand of the petitioner that t he respondents with the purpose to cover up delay and laches on their part towar ds granting permission to the petitioner to mortgage the assets as collateral se curity for raising working capital from bank, resorted to the propose action tow ards terminating lease deed. The petitioner has stated that the paper mill was t echnically revived and it was only due to the aforesaid hurdles confronting the petitioner the commercial production did not commence.

13. It is in the aforesaid background of the case, the petitioner has invoke d the writ jurisdiction of this Court with the prayer for issuance of a writ in the nature of mandamus directing the respondents to act as per the terms and con ditions of the MOU and the lease deed and to make payment of the dues amounting to Rs. 5,10,23,313.50 and to allow the petitioner to mortgage the assets of the respondent No. 2 company as collateral security for raising working capital loan and term loan from financial institution/State Bank of India. Further prayer ma de is for setting aside and quashing of the letters containing to the threat to terminate the lease agreement.

WP(C) No. 8341/2003

14. This writ petition has been filed in reference to the first writ petitio n setting out the basic facts narrated therein and discussed above. Additionally , it has been stated that the petitioner, for securing financial assistance from bank towards working capital by way of mortgaging the assets of APM as collater al security, laid out a comprehensive proposal in the prescribed form to the res pondent bank with intimation to the governmental authorities and the authority o f the APM. However, the working capital proposal submitted by the petitioner wit h the respondent bank having been turned down, the petitioner filed the writ pet ition seeking setting aside and quashing of the Annexure-11 letter dated 17.3.20 03 issued by the bank conveying its decision of rejection of the proposal. In th is connection, the petitioner has referred to its communications with the respon dents for favourable disposal of the proposal for financial assistance. By Annex ure-13 communication dated 17.6.2003, the respondent bank apprised the Managing Director, APM about its conclusion upon inspection of the unit that the mill can not be said to be fully restored, although some additional machinery has been in stalled. Stating about the trial run of the mill, it was indicated that the same was not as a whole unit, but not in respect of all the sections. As per the sai d communication, the mill was found to be in shut down condition and no preventi ve maintenance was done. Expressing its overall view, the bank intimated that th e revival of the unit would require complete renovation and restoration and that the makeshift restoration work done by the petitioner company may not be effica cious in resuming and continuing operations without interruption.

15. It is in the aforesaid backdrop, the prayer made in the writ petition, a part from the prayer for setting aside and quashing of the Annexure-11 rejection letter dated 17.3.2003, is for a direction to the respondent bank to grant cash credit limits of Rs. 5 crores towards working capital.

16. During the course of hearing, Mr. P.K. Goswami, learned Sr. Counsel arguing for the petitioner submitted that the petitioner may not have to press this petition in the attending facts and circumstances of the case, more particularly, if the petitioner succeeds in the first writ petition as the same would take into its fold the grievance raised in the second writ petition.

WP(C) No. 2745/2006

17. This writ petition has been filed by the employees union of APM with the prayers for appropriate direction to make the APM functional within specified period and to pay the outstanding dues to the employees with updating of the provident fund accounts of the employees. Further prayer made is for a direction towards CBI investigation relating to cause of the unit becoming non-functional.

18. In all the writ petitions, all the respondents, excepts the Union of India have filed their counter affidavits. However, Mr. H. Rahman, learned Assistant Solicitor General of India made his submissions in reference to M.C. No. 2802/2004, which the Union of India has filed seeking review of the order dated 3.3.2004 passed in the first writ petition, by which certain interim directions were issued for taking up the matter relating to release of the aforesaid amount of Rs. 5 crores with the Union of India by the Government of Assam.

19. In the affidavits filed by the respondents, the pleas raised in the writ petitions have been denied. According to them, it is the petitioner, which is responsible for the position in which the APM is after signing of the MOU and the lease agreement. It has been stated that the release of the amount of Rs. 5 crores is dependent on certain pre-conditions, which the petitioner measurably failed to fulfill. As regards the plea of the petitioner that it should be allowed to mortgage the assets of the APM as collateral security towards obtaining financial assistance, it is the stand of the respondents that the same being beyond the scope of the MOU and the lease agreement, cannot be ground for raising the grievance as has been raised in the writ petitions. The respondent bank in its affidavit has stated that the bank being not a signatory either to the MOU or to the lease deed, the petitioner cannot seek any enforcement of the clauses therein against the bank. According to it the proposal made by the petitioner was rightly turned down upon consideration and evaluation of the facts and circumstances.

20. Mr. P.K. Goswami, learned Sr. Counsel assisted by Mr. M. Bhuyan, learned counsel for the petitioner advancing argument in the first two writ petitions, has exclusively referred to the various clauses of the MOU and the lease deed referred to above. Emphasizing the need for a pragmatic approach to the chronic problem of revival of the unit in view of hostile conditions due to the apathy shown by the respondents, he submitted that if necessary the Court with appropriate directions may monitor the project of revival of the unit. According to him, the Union of India although party to the proceedings having not responded to the same by filing any counter affidavit, has virtually admitted the grievance raised by the petitioner and since it is the Union Government, who is responsible towards granting approval of utilization and release of Rs. 7.97 crore (Rs. 2.97 crores in hand and Rs. 5 crores to be sanctioned by the GOI), appropriate direction needs to be issued to the Government of India and other respondents.

21. Being confronted with the forceful argument made by the learned counsel for the respondents regarding maintainability of the writ petition in view of involvement of disputed questions of fact and being a contractual matter and also when the petitioner seeks implementation of the clauses in the MOU and the lease agreement, Mr. Goswami, referring to the principles involved towards exercising writ jurisdiction and putting emphasis that the writ jurisdiction is wide enough to take up all such matters even in case of availability of alternative remedy placed reliance on the decision of the Apex Court reported in (2004) 3 SCC 553 (ABL International Ltd. Vs. Export Credit Guarantee Corproation) as well as the

decision of this Court reported in 2007 (2) GLT 312 (Raja Kakati Vs. Union of India).

22. Mr. K.N. Choudhury, learned Additional Advocate General, Assam assisted by Mr. J. Patowary and Ms. A. Baruah, learned Advocates has questioned the very maintainability of the writ petition being involved with disputed questions of fact. He submitted that the writ petition are misconceived and that the Writ Court cannot issue any mandamus as has been prayed by the petitioner. He has also placed reliance on certain decisions which are AIR 1962 SC 1320 (M/s. Burmah Construction Company Vs. State of Orissa); 2006 (1) GLT 19 (State of Manipur Vs. Moirangthem Chaoba Singh; (2004) 9 SCC 786 (National Textile Corporation Ltd. Vs. M/s. Haribox Swalram) and (2004) 12 SCC 327 (State of Jammu & Kashmir Vs. Ghulam Mohd.).

23. Mr. B.D. Das, learned counsel represented the APM referring to the undertaking given by the petitioner, forming part of the order passed in WP(C) (PIL) No. 44/2000, about which a mention has been made above, submitted that after such undertaking furnished by the petitioner, the theme in which the writ petitions have been presented is misconceived and is by way of taking a chance for favourable consideration and to delay the liability upon failure to act as per the promise made. Referring to Article 13 of the lease agreement, he further submitted that there being alternative remedy by way of resolving the dispute, if any, through arbitration proceeding, the Writ Court would be reluctant to exercise writ jurisdiction towards entertainment of the claim made by the petitioner.

24. Mr. H. Rahman, learned Asstt. SGI, appearing on behalf of the Union of India also questioning the maintainability of the writ petition, submitted that the writ petitions are misconceived. As regards the submission of the learned counsel for the petitioner that in absence of any counter affidavit filed by the Union of India, the contentions raised in the writ petition go unrefuted, he submitted that mere non-filing of counter affidavit cannot lead to the presumption that the contentions in the writ petitions are admitted. He submitted that the Writ Court will not be oblivious of the glaring facts staring on the face of it and shall adopt a mechanical approach to the matter.

25. Mr. S. S. Sarma, learned Sr. Counsel assisted by Mr. R.K. Bhatra, learned counsel representing the bank, referring to the bank’s stand in the affidavit submitted that the petitioner cannot seek any mandamus against the bank for providing financial assistance. He submitted that it is for the bank to decide about the viability of the proposal for financial assistance.

26. Mr. G. Uzir, learned counsel for the petitioner in the third writ petition highlighting on the plight of the employees of the APM submitted that amidst the dispute by and between the parties, it is the employees who have been made to suffer for no fault of their own. He submitted that the respondents cannot shirk off their responsibilities in making the APM functional and to pay the outstanding dues to the employees. He submitted that inaction on the part of the respondents is the primary cause for which the unit is in the present situation and as such appropriate direction needs to be issued for a proper enquiry relating to the affairs of the APM and as to who are responsible for the same.

27. I have given my anxious consideration to the submissions made by the learned counsel for the parties and the materials on record. During the course of hearing, Mr. Goswami, learned counsel for the petitioner produced the copy of the representation made by the petitioner on 30.5.2007 to the Minister of Industries forwarding the proposal for revival of the APM in collaboration with another company M/s. Century Plyboards (I) Limited. According to Mr. Goswami the proposal has receipt due attention of the concerned Minister. However, Mr. Choudhury, learned Additional Advocate General, Assam upon written instruction furnished to him by letter dated 6.6.2007 submitted that there was no scope of the new propos

al and that the same has no connection with the MOU and the lease agreement by a nd between the parties.

28. The whole emphasis of the petitioner interalia is on clause 9 of the MOU and clause 3, 4, 8, 9 and 13 of the lease agreement. For a ready reference the said clauses (relevant sub-clauses) are quoted below:

MEMORANDUM OF UNDERSTANDING

9.3 I) The balance of the amount earmarked under the Assam Accord as Cash Lo ss for the revival of the mill are Rs. 7.97 crores out of which Rs. 2.97 crores are available with the First Party. Govt. of Assam shall take necessary steps fo r immediate release of the balance of Rs. 5.00 cores by the Govt. of India.

In view of the present condition of the Plant & Machinery of the Mill, to avoid any further loss of life of the plant an estimate amount of Rs. 700 cores shall be required to be invested towards capital expenditures, for viable and smooth o peration of the mill. Govt. of India will be approached by First Party t allow u tilization of the above amount earmarked for cash loss towards capital expenditu re and working capital for revival of the mill and this amount will be released to the second party for capital expenditure and working capital and approval of Govt. of India would be sought. The following modalities will be followed while releasing Rs. 7.97 crores to the Second Party.

a) & & & &..
b) & & & &..
c) Further the balance fund, subject to maximum of Rs. 6.97 lakhs will be r eleased in installments of Rs. 1,00 lakh (Rupees One hundred lakh) on submission of certificate of utilization by Chartered Accountant of the party of the Secon d Part and also on verification and satisfaction by the party of the First Part regarding capital expenditure in creation of assets for the revival of the Mill, subject to release of the fund Rs. 5.00 lakhs by Govt. of India.

1.9 Concessions/Incentives

All concessions/incentives as per Industrial Policy of Assam 1997 or subsequent concessions/incentives given by the Assam Government and the Government of India from time to time to North Eastern States shall be made available for the perio d which is available to a new unit to the Party of the SECOND PART. The Party of the SECOND PART shall be given the STATUS OF a New Unit for the purpose of all such incentives from the date of the possession of the Unit. However, the follo wing concessions/incentives shall be made available to the party of the SECOND P ART.

I. The State Government shall take up with the Government of India for gran ting Excise duty exemption for a minimum period of 10 years from the date of com mercial production immediately to the Party of the SECOND PART as per the Assam Accord, as allowed to M/s. Sanghi Textiles Processors (P) Ltd.
II. The Sales Tax exemption will be granted to the part of the Second Part f or a period of 10 years with effect from the date of commercial production.

LEASE DEED

3.5 The Lessor hereby undertakes to provide necessary supply of electrical ener gy to the lessee from the Assam State Electricity Board (ASEB). The Lessor will see and ensure that there is uninterrupted supply of electrical energy to the le ssee though the lessee period. The lessor shall make all effort to ensure that t he position uninterrupted power supply continuous subject to the payment of cost of such supply within the stipulated period.

3.6. The Lessor undertakes to arrange the following for the lessee through the Govt. of Assam:

i. 100% Sales Tax Exemption for all purchases including capital goods and sales of products/produce for a period of 10 years from the date or commercial production.
ii. 100% excise duty exemption to be provided by the Government of India for a period of 10 years from the date of commercial production.

3.7. The Lessor and/or the Government of Assam shall assist the lessee in obtaining all statutory clearance by various departments for restarting the until including but not limited clearance required to be obtained by the Pollution Control Board, Assam. The lessee agrees to submit a plan for the phased implementation of any scheme required and to abide by the provisions of the Ministry of Environment and Forests, Government of India as per existing treatment plant. For a new effluent plant, or upgrading the existing effluent treatment plant as may be required under any directive of the pollution control board or any court or authority, if any investments of capital nature are required to be made, the funds for the said purpose shall be made available by the lessee from banks and financial institution or otherwise from their own resources and the Lessor, shall accord concurrence to create the required mortgage/lien/charges or any other encumbrances proposed to be created on the assets of the unit by the lessee, as required by the lessee.

4.4. The lessor and the lessee acknowledge that the balance amount earmarked under the Assam Accord as Cash Loss for the revival of the Unit are Rs. 7.97 crores, out of which Rs. 2.97 crores are available with the lessor. The lessor undertakes to cause the Govt. of Assam to arrange for releasing the balance amount Rs. 5.00 crores from Govt. of India and shall take all necessary steps for immediate release of the balance Rs. 5.00 crores from the Govt. of India.

4.5 In view of the present condition of the Plant & Machinery of the unit, and to avoid any further loss of the life of the plant, and estimated amount of Rs. 700 lakhs (seven hundred lakhs) shall be required to be invested towards capital expenditures, for viable and smooth operation of the unit. The lessor shall approach the Govt. of India to allow utilization of the above amount earmarked for cash loss towards capital expenditure and working capital for revival of the unit and this amount shall be released to the lessee for capital expenditure and working capital. The following modalities will be followed while releasing Rs. 797 lakhs (rupees seven hundred ninety seven lakhs) to the lessee.

a) Immediately after takeover, the lessee will take effective steps to start the plant. For this purpose the lessee will invest Rs. 1.00 lakhs towards capital expenditure for creation of assets.
b) Having being assured and certified by lessor of proper utilization of above Rs. 100 lakhs (Rupees one hundred lakhs) by the lessee, and the Chartered Accountant of the Lesse Rs. 100 lakhs (Rupees one hundred lakhs) out of the funds earmarked against cash loss will be released by the lessor within 7 days of submission of Chartered Accountant’s certificate by the lessee, towards creation of the capital assets of the mill.
c) Further, the balance fund, subject to maximum of Rs. 697 lakhs (Rupees six hundred ninety seven lakhs) will be released by the lessor in installments of Rs. 100 lakhs (Rupees one hundred lakhs) each on submission of certificate of utilization by Chartered Accountant of the Lessee and also on verification and satisfaction by the lessor regarding capital expenditure in creation of assts for the revival of the mill, subject to release of the fund of Rs. 500 lakhs (Rupees five hundred lakhs) from the Govt. of India.
Such release will be made within 7 (seven) days of submission of Chartered Accountant’s certificate by the lessee.

d) After having spent the money on capital expenditure, the balance fund (balance out of Rs. 7.97 lakhs) (Rupees seven hundred ninety seven lakhs or if any) will be disbursed to the lessee as working capita which shall in due course of time be adjusted against cash loss, within first 2 years of operation of the unit by the lessee. However, such cash loss shall be duly certified by the lessor and the Chartered Accountant of the lessee.

If there is no cash loss, in that case, the amount shall be used s working capital by the lessee and such working capital can also be adjusted against future capital expenditures made by the lessee for creation of assets of the mill, duly certified by the official of the lessor and the Chartered Accountant of the lessee. However, if such amount is not adjusted either against cash loss in 1st two years of operation or for creation of assets and in the event of discontinuation of the lease by the lessee, such amount shall have to be refunded by the lessee to the lessor.

4.5.2 The lessee shall not claim any future cash loss beyond the amount provided in the Assam Accord or if there is no afresh funding on this head by the Govt. of India.

4.5.3 The Govt. of Assam shall take up with Govt. of India to impress upon Bank/Financial Institutions to provide working capital loan @ 10% interest to the lessee as per the terms and conditions of Revival Package agreed by Govt. of India under Assam Accord against the amount of Rs. 303 lakhs (Rupees three hundred three lakhs) released by Govt. of India for payment of outstanding dues to financial institutions/banks.

4.5.4 All other grants, invectives, and funds given by Government of Assam or Central Government under any head and/or policy planning o revival of industries shall be made available to the lessee for the period which is applicable for a NEW UNIT. The lessee shall be given/granted the STATUS of New Unit from the date of receiving possession of the said undertaking.

4.5.5 Government of Assam shall assist the lessee to get working capital from Banks and capital loans from Banks/Financial Institution including State Bank of India, IDBI, IFCI etc. etc. at prescribed interest rates as per provision in the package for revival of Ashok Paper Mill (Assam) Limited but shall not stand guarantee for such loan/working capital taken by the lessee.

8.1 All concessions/incentives as per industrial policy of Assam 1997 or subsequent concessions/incentives given by the Assam Government and the Government of India from time to time to North Eastern States shall be made available to the new unit to the lessee. The lessee shall be given status of a new unit for the purpose of such incentives/concessions from the date of possession of the unit. However, the following concessions/incentives shall be available to the lessee.

(i) The State Govt. shall take up with the Govt. of India for granting exemption of excise duly for a minimum period of 10 years from the date of commercial production.
(ii) Sales tax exemption shall be granted to the lessee for a period of 10 years w.e.f. the date of commercial production for which necessary eligibility certificate shall be issued.

9.1 The lessee shall be entitled to mortgage its leasehold rights and to create charge on its self acquired assets at the unit to any Bank or financial institution to raise any loans or working capital facilities for the mill with prior intimation tot eh lessor and also to dispose of any stores or old equipment and use the proceeds in fixed capital investments required for the running of the mill, with the prior written approval of the lessor and Government of Assam. However, the lessor shall communicate its decision to lessee within 30 days of receipt o

f such proposal from the lessee as per clause 10.1.

9.2 The lessee shall not sub-let/mortgage/sell any movable/ immovable property o r part thereof to any financial institution or other part and create charge and or liabilities on such assets of the mill without prior written permission from the lessor.

13.1 If any dispute or difference of any kind whatsoever shall arise between the parties in connection with or arising out of this deed including any question r egarding its existence, validity or termination of the execution of the works, w hether before or after the termination, abandonment or breach of this deed, the parties shall seek to resolve any such dispute or difference by mutual consultat ion.

13.2 If the lessor and lessee fail to resolve such dispute or difference by mutu al consultation, then either party may give to the other part formal notice in w riting that the dispute of difference exists, specifying its nature, the point(s) in issue and its intention to refer the dispute to arbitration.

13.3 If the lessor and lessee fail to resolve such dispute or difference by furt her consultation within a period of thirty (30) days from the date upon which su ch notice of dispute has been given, the dispute or difference shall be referred to and finally settled by arbitration.

13.4. It is agreed between the lessor and lessee that n such event the arbitrati on shall be conducted in accordance with the Arbitration and Conciliation Act, 1 996. It is further understood between the parties that one arbitrator shall be a ppointed by the lessor and one arbitrator shall be appointed by the lessee and t he Presiding Arbitrator shall be nominated by these two arbitrators as aforesaid or in accordance with the Act. The venue of the Arbitration shall be at Guwahat i and the language of Arbitration proceeding shall be English.

29. The minutes of discussion held on 7.8.2002, on which the petitioner has placed reliance contents the following clause;

4. The matter of release of fund of Rs. 5 crores against Cash loss will be take n up with the Government of India only after the mill goes into continuous comme rcial production for a minimum period of 3 months

30. The petitioner was also party to the writ proceeding, which was initiate d in the form of PIL viz WP(C) PIL No. 44/2000, which was disposed of by order d ated 18.11.2002. It was recorded in the order that after receipt of the Governme nt directives for starting production of the mill by 31.12.2002, the petitioner undertook initiative for starting of the mill with the impression that it would be able to start production in the mill by the deadline given by the Government in its communications. In this connection, the Annexure-10, 11, 12 and 13 letter s dated 21.10.2002, 9.10.2002, 1.11.2002 and 6.11.2002 about which mention has b een made above, may be referred to. In fact the order passed in the PIL refers t o the said letters, in reference to which the order recorded the undertaking fur nished by the petitioner to start production within the target date i.e. 31.12.2 002.

31. Clause 4.5.5, provides for assistance from the Government of Assam to ge t working capital from banks and capital loans from bank/financial institutions including State Bank of India. However, it equally provides that the Government of Assam shall not stand as guarantor for such loan/working capital taken by the lessee. It is the clear stand of the APM in their affidavit that the petitioner failed to provide lease rent for the months of February to December, 2003 amoun ting to Rs. 1,65,50,000/- together with interest of Rs. 18,967/-. It is also its stand that the petitioner has violated clause 2.6 of the lease deed by taking o

ut some of equipments from the mill premises without the permission of the lesse r. According to APM the petitioner did not clear the ASEB dues for September and October, 2003 as a consequence of which the electricity supply was discontinued . The petitioner also did not response to the request made for clearance of all the dues including the payment of wages to the workers. It has already been note d above that the petitioner failed to start to commercial production even after furnishing undertaking recorded in the aforesaid PIL. For a ready reference, the order is quoted below:

An additional affidavit is filed by the Respondent No.3, Ashok Paper Mill (Ass am) Ltd. stating in Paras 4 and 5 are quoted hereinbelow:-

4. That, the Deputy Secretary, Government of Assam, Industries and Commerce Department by a letter dated 9th Oct. 2002 directed the deponent to take an und ertaking from the Respondent No.4 to start production by 31.12.2002 failing whic h steps to be initiated for terminating the lease agreement. After receipt of t his letter, the deponent by a letter dated 21.10.2002 advised the respondent No. 4 for starting the production in the Mill by 31.12.2002 failing which action wou ld be initiated for termination of the lease. Subsequently thereafter, the depo nent by another letter dated 1.11.2002 reiterating Govt's directive for starting production in the Mill by 31.12.2002 informed that failing to do so by the dead line set by the Government, they shall have no option but to take action for ter minating the lease agreement in question.

The copies of the aforesaid letters dtd. 9.10.2002, 21.10.2002 and 1.11.2002 are annexed hereto and marked as Annexure 1, 2 and 3 respectively.

5. That, the deponent respectfully states that after issuance of the afores aid letters it has come to their knowledge, that the respondent No.4 has taken d ue initiative for starting of he Mill in question and the deponent is of the vie w that the respondent No.4 would be able to start production in the mill by the deadline given by the Govt as mentioned above.

In view of the aforesaid, the grievances expressed by the petitioner in the Publ ic Interest Litigation seems to be satisfied and accordingly the petition stands disposed of. However, in case, the expressions made in Paras 4 and 5 is not gi ven effect to, it shall be open to any citizen to approach this Court.

32. On a reading of the clauses in the MOU and the lease deed, no provision could be found for collateral securities. Clause 3.7 of the lease agreement on w hich much reliance has been placed by the petitioner, it is for a new effluent p lant or upgrading the existing effluent treatment plant as by the required under any directive of the Pollution Control Board or any Court or authority, if any investments of capital nature are required to be made, the funds for the said pu rpose shall be made available by the lessee from banks and financial institution s or otherwise from their own resources and the lessor, shall accord concurrence to create the required mortgage/lien/charges or any other encumbrances proposed to be created on the assets of the unit by the lessee, as required by the lesse e. Read as a whole, this clause cannot be said to be a licence to the petitioner to mortgage the assets of the APM as collateral security for raising working ca pital loan and term loan from financial institution/State Bank of India.

33. As regards the release of Rs. 5 crores by the Government of India, claus e 9.3 of the MOU provides for certain modalities upon fulfillment of which only the petitioner is entitled to receive the same. In this regard, the role of the lesser is to approach the Government of India to allow utilization of the amount earmarked. The release of the amount is not automatic and subject to further co nditions incorporated in the lease agreement, followed by the above referred min utes of discussions dated 7.8.2002 in terms of which the release of Rs. 5 crores against cash loss was to be taken with the Government of India only after the m ill had gone into continuous production for a minimum of three months. Admittedl y, the petitioner failed to go for commercial production evenafter furnishing th e undertaking, which forms part of the order, passed in the PIL.

34. Certain duties and obligations are also cast on the petitioner as per Article 5 of the lease deed, which includes necessary repairs and maintenance of buildings, machineries, utilities, erections fixtures and fittings in good and satisfactory working condition. As per clause 5.5 it is the duty of the petitioner to pay directing to the concerned authorities all charges relating to consumption of electricity, water, royalty for forest or any other charge. Clause 5.7 provides for repairing/replacement of damage properties by the petitioner and as per the requirement of clause 5.8, upon starting of commercial production, the petitioner shall have to deposit an amount of Rs. 21,00,000.00 in cash or in the form of bank draft in favour of the lesser as the collateral security towards salary and wages of the employees of APM. Article 6 mentions about relationship and reorientation of work force recruitment. As per Article 7, it is the duty of the lessee to make necessary arrangement for power supply if the ASEB fails to meet the full requirement. As regards the incentives relating to sales tax, exemption etc., same is available only after commercial production.

35. As regards charge/sub lease, the lessee is not entitled to sub-let/mortgage any movable/immovable property to any financial institutions and creates charge and/or liabilities on such assets of the mill without prior written permission from the lesser. The lease agreement also contains the clause relating to termination of the lease deed and as noted above Article 13 provides for resolving the dispute by and between the parties through arbitration proceeding. It is in this regard, learned counsel for the respondents argued on non-maintainability of the writ petition. To counter the argument relating to maintainability of the writ petition, learned counsel for the petitioner has placed reliance on a decisions referred to above. Even in ABL International Ltd. (supra), on which the learned counsel for the petitioner has placed reliance, the Apex Court upon a specific enquiry found that there was no arbitration clause in the contract in question, unlike the present case, in which there is specific clause for arbitration. In this connection, the following observation is noteworthy.

> & & &. It is well known that if the parties to a dispute had agreed to settle their dispute by arbitration and if there is an agreement in that regard, the Courts will not permit recourse to any other remedy without invoking the remedy by way of arbitration, unless, of course both the parties to the dispute agree on another mode of dispute resolution & & &..

36. In Raja Kakati (supra) dealing with the question of fairness in the administrative action towards terminating the particular dealership and having found that there was complete violation of the principles of natural justice, set aside and quashed the termination of the dealership. It was in that context and having regard to the well known principles that where there is violation of the principles of natural justice and where the order proceedings are wholly without jurisdiction, alternative remedy would not operate as a bar towards entertaining the writ petition under Article 226 of the Constitution of India. In an appropriate case, the writ court has the jurisdiction to entertain the writ petition involving disputed questions of fact and that the rules of exclusion of writ jurisdiction by availability of alternative remedy is of discretion and not one of compulsion. Unlike the said case, in the instant case, the petitioner has prayed for implementation of the terms and conditions of the MOU and the lease agreement and also for release of the amount purportedly due to the petitioner. In the second writ petition, it seeks a direction compelling the respondent bank to sanction cash credit limits.

37. The disputes raised by the petitioner in both the writ petitions are relating to scrutiny and appreciation of the terms and conditions of the MOU and the lease agreement, which naturally involve disputed questions of, more particularly, when the respondents have denied that there is any violation of the conditions. It is in this context, learned Additional Advocate General has placed reliance on the decisions referred to above. To start with, in M/s. Burmah Constructi

on Company (supra), the Apex Court observed that normally, the High Court exercising writ jurisdiction under Article 226 of the Constitution of India does not entertain a petition for enforcing a civil liability arising out of the purported breach of a contract or a tort or for payment of an amount of money purportedly due to the claimant and leaves it to the aggrieved part to agitate in a civil suit. Writ jurisdiction can be exercised to enforce statutory obligation.

38. In Moirangthem Chaoba (supra), the Division of this Court has held that when the contract entered into by and between the State and persons agreed is non-statutory and purely contractual and the rights are governed only by the terms of the contract, no writ or order can be issued under Article 226 of the Constitution of India so as to compel the authorities to remedy a breach of contract pure and simple. Likewise, in Ghulam Mohd. (supra) the Apex Court noticing that the contract agreement entered into by and between the parties contained an arbitration agreement and the writ petition was filed for enforcing a contract qua contract held that the writ petition was not maintainable. Same view has been expressed in National Textile Corporation (supra).

39. In State of U.P. Vs. Bridge & Roof Co., reported in (1996) 6 SCC 22, the Apex Court observed that in respect of any dispute relating to private contract proper curse for the aggrieved party would be to reference to arbitration or institution of suit and not writ petition. Likewise, in Commissioner of Income Tax Vs. U.P. Forest Corporation, reported in AIR 1998 SC 1125, the Apex Court emphasized that the aggrieved party should not normally short circuit the procedure provided by the taxing stature and seek the redress by filing a petition under Article 226 of the Constitution of India. In State of H.P. Vs. Raja Mahendra Pal, reported in (1999) 4 SCC 43, the Apex Court expressing the similar view observed that the High Court would not ordinarily entertain a writ petition under Article 226 to enforce a contractual right particularly when an efficacious alternative remedy is available.

40. In Tamilnadu Electricity Board Vs. Sumathi, reported in (2000) 4 SCC 543, the Apex Court held that where there are disputed questions of fact and an unequivocal denial of tortuous liability, seeking remedy under Article 226 may not be proper. Likewise, in Kerala State Electricity Board Vs. Kurien E Kalathil, reported in (2000) 6 SCC 293, dealing with the particular agreement held that the interpretation and implementation of a clause in a contract cannot be the subject matter of a writ petition. It was observed that if a term of a contract is violated, ordinarily the remedy is not a writ petition under Article 226 and that a contract would not become statutory simply because it is for construction of a public utility and it has been awarded by a statutory body.

41. In Haryana Urban Development Authority Vs. Anupama Patnaik, reported in (2000) 10 SCC 649, holding that the writ petition involving claim for money with disputed questions of fact, was misconceived and ought not to have been entertained by the High Court, the Apex Court held thus:

> It is rather strange that a simple claim for money was made in a writ petition and was entertained by the High Court and allowed. There are several disputed questions of fact. Each party alleging that the other party is guilty of violation of the terms of the allotment. The matter is not covered by any statutory provisions. The writ petition itself was misconceived and not ought to have been entertained. Accordingly, this appeal is allowed and the judgment of the High Court is set aside.

41. In Orissa Agro Industries Corporation Ltd. Vs. Bharati Industries, reported in AIR 2006 SC 198, upon a reference to the earlier decisions, the Apex Court reiterated that the disputed questions of fact cannot be gone into in writ jurisdiction and that the course is clearly impermissible. It has further been reiterated that the writ petition is not an appropriate remedy for impeaching contra

ctual applications. The said case being one of, where the contract entered into between the State and the person aggrieved was non-statutory and purely contractual and the rights and liability of the parties were governed by the terms of the contract and in exercise of executive power of the State, it was held that no writ or order can be issued under Article 226 to compel the authorities to remedy a breach of contract; pure and simple. It is more so when factual disputes are involved.

42. In the instant case, the prayers made by the writ petitioner have been noted above. By the said prayers, the petitioner alleges violation of the terms and conditions of the MOU and the lease agreement and on that basis seeks proper implementation of the same by the respondents. On the other hand, the respondents have contended that there is no violation of any of the terms and conditions. According to them, they have acted strictly in accordance with the terms and conditions. It will be pertinent to mention here that, although, certain interim orders were passed while entertaining the writ petitions, but the respondents, more particularly, the Union of India have sought for modification, cancellation and/or alteration of the same and the said prayer is still pending.

43. In the additional affidavit filed by the respondent No. 2, it has stated about the spot inspection in the mill premises carried out on 16.6.2006, which the representatives of the petitioner did not attend although they were apprised of the same. The spot inspection revealed that the mill is an abandoned and dilapidated condition and there was none to look after the affairs of the unit except few security personnel and two site in-charge. The inspection carried out by officials of the respondent No. 2 also revealed that there was total lack of maintenance in the mill and was covered by weeds/jungles etc. It was also found that expensive damage has been caused to the machineries and many of the machineries were found missing. The loss was estimated at Rs. 2 crore (approximately). Even and FIR has been lodged relating to such affairs. The petitioner has not denied the allegations made in the additional affidavit by filing any rejoinder affidavit.

44. The writ petitions had been filed at a time when the aforementioned Annexures-10, 11, 12 and 13 letters dated 21.10.2002, 9.10.2002, 1.11.2002 and 6.11.2002 were issued to the petitioner with clear intimation that termination notice would be issued in case of failure to start production within the target date i.e. 31.12.2002. By Annexure-12 letter dated 1.11.2002 an explanation was sought for within 7 days upon failure of the petitioner to start activities towards starting production within the target date. The order passed in the PIL has been noted above, in which it was recorded that the petitioner given undertaking for starting commercial production within the target date. The release of the amount of Rs. 5 crore was subject to fulfillment of one of the conditions incorporated in the minutes of discussion held on 7.8.2002, which was release of the amount taking up the matter with the Government of India after the mill went into continuous commercial productions for a minimum period of three months. Admittedly, the petitioner failed to comply with this condition. If that be so, the prayer made in the writ petition for release of the amount cannot be granted.

45. Further prayer made in the first writ petition is to allow the petitioner to mortgage the assets of the unit as collateral security for raising working capital loan and term loan from financial institution/State Bank of India and also to set aside and quash the impugned Annexures-11 and 13 letters dated 9.10.2002 and 6.11.2002. The circumstances in which, those two letters had to be issued have been discussed above. I do not find any infirmity in the same. On a plain reading of the MOU and the lease agreement would go to show that the petitioner is not entitled to mortgage the assets of the unit towards procuring working capital loan and/or term loan. Thus, the prayer made and that too invoking the writ jurisdiction of writ court is misconceived.

46. It is possibly realizing the fallacy of the prayer made in the second writ petition seeking issuance of mandamus to the respondent bank to grant cash credit limit and to set aside and quash the Annexure-11 letter dated 17.3.2003 by which the proposal of the petitioner was turned down, the learned counsel for the petitioner, during the course of hearing submitted that the second writ petition is dependent on the outcome of the first writ petition, thereby virtually agreeing that the writ court cannot issue any mandamus for granting mandamus to the financial institution for granting any particular loan to a party. The bank before providing any financial assistance as per the proposal made by any party, necessarily will have to verify the feasibility of the proposal so made. It cannot grant any financial assistance merely on asking for it. The fact that the bank declined to provide financial assistance to the petitioner upon verification of the proposal and considering the condition of the unit would rather support the case of the respondents that the petitioner failed to revive the mill as was expected of for which the MOU and the lease agreement were executed. Thus the prayer made in the second writ petition is misconceived and cannot be granted.

47. The third writ petition has been filed by the employees association of the APM for payment of wages and maintenance of provident fund accounts. Further prayer made is for a CBI investigation relating to the affairs of the unit. This Court is not exercising the power and jurisdiction exercisable towards entertaining public interest litigation. The writ has been filed basically for wages, both arrear and current. The prayer for CBI inquiry has been made incidentally. In the counter affidavit filed by the respondents, they have referred to the suit being T.S. No. 61/1999, now pending in the Court of the learned Civil Judge (Sr. Division), Bongaigaon. The earlier lessee of the unit in which the respondents have also made counter claim has initiated the said proceeding. It appears that the earlier lessee stopped payment of salary with effect from October, 1998. According to the respondents, the salary for the period from October, 1998 to 15.6.1999 the date on which the unit was taken over by the respondents from the earlier lessee is payable by the earlier lessee.

48. As regards the claim for salary for the subsequent period, it is the stand of the respondents that it is the liability of the petitioner in the first two writ petitions to pay salary to the employees. It has further been stated that in case of failure to pay the same, the respondents would have no alternative, but to take appropriate action for realization of the same from the petitioner in the first two writ petitions. In fact, demand for payment of salary etc. was made to the petitioner by the APM by its Asnnexure-2 letter dated 20.11.2006, a copy of which has been annexed to the counter affidavit filed by the respondents No. 6 and 7 i.e. the APM and its Managing Director.

49. The MOU and the lease agreement have not come to an end as yet. The first writ petition was filed at a time when the aforementioned letters indicating termination of the same were issued. In view of the pendency of the writ petitions with interim orders, no final decision in the matter could be taken, although the respondents in their counter affidavits have made their intention clear attributing failure on the part of the petitioner. Thus, the issue relating to payment of salary to the employees of the unit will be dependent on the final outcome of the decision to be arrived by the respondents. The respondents have not denied the claim of the petitioner association, but have indicated that such claim is to be made to the petitioner in the first two writ petitions. Be it stated here that the petitioner in the said two writ petitions are not party to the third writ petition and as such no direction can be issued to it. It will be open for the respondents to take such course of action as may be available to them under the law.

50. For all the foregoing reasons, discussions and conclusions, the first two writ petitions merit dismissal, which I accordingly do. The third writ petition stands disposed of in terms of the observations made above.

51. The writ petition being WP(C) No. 8097/2002 and WP(C) No. 8341/2003 are dismissed. WP(C) No. 2745/2006 is disposed of as above. As a consequence of dismissal of the writ petitions, the interim orders passed therein are of no consequence and the prayers for modification/alteration and/or cancellation of the same made by the respondents stand granted. There shall be no order as to costs.